



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC - 1 2008

Ms. Carol A. Laham, Esq.
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

RE: MUR 5415
Citizens Club for Growth, Inc.,
f/k/a Club for Growth, Inc.,
Citizens Club for Growth, Inc. PAC
f/k/a Club for Growth, Inc. PAC,
and Pat Toomey, in his official
capacity as treasurer

Dear Ms. Laham:

On April 19, 2005, your clients, Citizens Club for Growth, Inc., f/k/a Club for Growth, Inc., ("CFG, Inc."), Citizens Club for Growth, Inc., and PAC f/k/a Club for Growth, Inc., PAC and Pat Toomey in his official capacity as treasurer ("CFG PAC") were notified that the Federal Election Commission found reason to believe that CFG PAC violated 2 U.S.C. §§ 434, 441a(a) and 441b, and that CFG, Inc. violated 2 U.S.C. §§ 441a(a), and 441b.

Following an investigation, and after considering the circumstances of the matter, the Commission determined on November 12, 2008, to take no further action as to CFG, Inc., and CFG PAC and closed the file in this matter. The redacted General Counsel's Report, which explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

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Ms. Carol Laham, Esq.
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If you have any questions, please contact me at (202) 694-1650.

Sincerely,



Dawn M. Odrowski
Attorney

Enclosure
Redacted General Counsel's Report #3

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Citizens Club for Growth f/k/a) MUR 5415
 Club for Growth, Inc.)
 Club for Growth, Inc. PAC and Pat Toomey,)
 in his official capacity as treasurer)
 Pat Toomey for Senate Committee and)
 Jeffrey M. Zimkind, in his official capacity)
 as treasurer)

GENERAL COUNSEL'S REPORT # 3

I. ACTION RECOMMENDED: Take no further action and close the file as to Citizens Club for Growth, Inc. f/k/a Club for Growth, Inc., ("CFG, Inc."), Citizens Club for Growth, Inc. PAC f/k/a Club for Growth Inc, and Pat Toomey, in his official capacity as treasurer ("CFG PAC"), and Pat Toomey for Senate Committee and Jeffrey M. Zimkind, in his official capacity as treasurer.

II. INTRODUCTION

Based on a complaint filed by Citizens for Arlen Specter, responses to the complaint, and publicly available information, the Commission previously found reason to believe that Club for Growth, Inc., Club for Growth, Inc. PAC (collectively, "the CFG Respondents") and Pat Toomey for Senate ("the Committee") all violated the Act by coordinating CFG Respondents' expenditures for broadcast advertisements, which referenced Senator Arlen Specter, through a common vendor who simultaneously served as a general and media consultant to the CFG

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1 Respondents and the Committee during the 2004 election cycle.¹ See Factual and Legal Analyses
2 for CPG/CPG PAC and the Committee.

3 **III. PROCEDURAL BACKGROUND**

4 The CPG Respondents and the Committee each responded to the complaint by denying
5 that they had coordinated advertisements. CPG submitted an affidavit from its Executive
6 Director David Keating in support of its response that specifically addressed one CPG-financed
7 advertisement that was aired before the complaint was filed and denied that the common vendor,
8 Red Sea, LLC, had any role in its creation or distribution. Respondents' denials were broad but
9 largely conclusory and lacked a sufficient factual basis to support them. For example, the
10 responses did not address the work performed by Red Sea and its principal Jon Lerner for the
11 CPG Respondents and the Committee or the nature and extent of the interactions between Red
12 Sea and the CPG Respondents concerning the Toomey-Specter primary. Moreover, a
13 December 26, 2003 letter from Lerner to Keating, attached to Keating's affidavit, confirmed an
14 understanding that Red Sea and the CPG Respondents would "henceforth" observe a
15 communications ban about the Toomey-Specter primary, which raised questions regarding their

¹ The Commission had made alternative reason to believe findings in this matter that were dependent on whether CPG, Inc. was ultimately determined to be a political committee, a non-federal account of CPG PAC or a corporation. That issue was being squarely addressed in MUR 5365, a then-pending matter. If CPG, Inc. was determined to be separate political entity, communications coordinated with the Committee would have resulted in excessive contributions, in the form of coordinated expenditures, by CPG, Inc.; if CPG, Inc. was considered a non-federal account of CPG PAC, coordinated communications would have constituted the use of non-federal funds to pay for coordinated expenditures; and if CPG, Inc. was considered a corporation, coordinated communications would have constituted prohibited corporate contributions. In the case of CPG PAC, communications coordinated with the Committee would have constituted excessive contributions.

In a lawsuit filed by the Commission when probable cause conciliation failed in MUR 5365, the parties ultimately signed a settlement agreement in which CPG agreed not to contest the Commission's conclusions that it had failed to register and report as a political committee as of August 2000, paid a \$350,000 civil penalty, and agreed to file with the FEC reports covering CPG, Inc.'s activity from August 2000 through September 6, 2007. See Consent Judgment dated September 6, 2007, in *FEC v. Citizens Club for Growth*, Case No. 05-1851 (D.D.C.).

1 communications before that date.

2 Consequently, the Commission made its reason to believe findings and approved
3 subpoenas to the CPG Respondents and the Committee. The CPG Respondents then filed a
4 motion to reconsider the RTB findings, and they and the Committee simultaneously filed
5 motions to quash the subpoenas. In connection with these motions and subsequent negotiations
6 about the scope of the subpoenas, the CPG Respondents submitted a second affidavit from Mr.
7 Keating, an initial and supplemental affidavit from Jon Lerner, and an affidavit from Jonathan
8 Baron, then co-principal of Red Sea. Keating's supplemental affidavit addressed all four of the
9 CPG Respondents' advertisements that referenced Senator Specter and aired in 2004. The
10 additional affidavits provided further information but they still lacked sufficient factual
11 information to support the broad denials that neither the Committee nor Red Sea were materially
12 involved in decisions about the advertisements or that Red Sea conveyed to the CPG
13 Respondents information about the Committee's plans, projects, activities, or needs. When we
14 were unable to reach an agreement with Respondents on the scope of the subpoenas, the
15 Commission denied their motions to quash but narrowed the scope of the subpoenas.
16 Respondents subsequently filed responses to the Commission's discovery requests.

17 The investigation, discussed below, revealed no evidence that the CPG Respondents and
18 the Committee coordinated expenditures through Red Sea for CPG/CPG PAC-financed broadcast
19 advertisements that referenced Senator Arlen Specter in 2004.

20 **IV. RESULTS OF INVESTIGATION**

21 The investigation centered on whether Red Sea used or conveyed to the CPG
22 Respondents information about the plans, projects, needs or activities of the Toomey campaign,

1 or information used previously by Red Sea in providing services to the Committee, that was
2 material to the creation, production or distribution of the CPG Respondents' four Specter
3 advertisements. 11 C.F.R. § 109.21(d)(4)(iii) (2004).² We also examined whether by virtue of
4 its close relationship to the CPG Respondents and the Committee, Red Sea may have been
5 materially involved in decisions about the media advertisements at issue by providing advice
6 using information from the Committee that CPG later used in making decisions about those
7 advertisements. See 11 C.F.R. § 109.21(d)(2) (2004). During the investigation, we reviewed
8 documents produced in response to the Commission's subpoenas,³ interviewed a number of
9 witnesses including former CPG employees, Lerner, and the campaign managers of the
10 Committee, and re-evaluated the previously-submitted affidavits in light of this new information.
11 Based on our interviews and analysis of the information gathered, we obtained an affidavit from

² The activity at issue in this matter occurred prior to the July 10, 2006 effective of the amended coordinated communications regulations at 11 C.F.R. § 109.21(e) and (d). See Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). Accordingly, all citations to the Commission's regulations refer to them as they existed prior to that date. The amended coordination regulations, among other things: 1) reduced from 120 to 90 days the pre-election window during which certain communications that refer to a clearly identified House or Senate candidate satisfy one of the coordinated communication content standards; 2) created a safe harbor for, among others, common vendors that establish and implement a firewall to prevent the transmission of information between a person who pays for a communication referencing a federal candidate and a candidate/candidate committee; and 3) created a safe harbor providing that the conveyance or use of publicly available information that is material in creating, producing or distributing a communication does not satisfy the conduct standards in 11 C.F.R. § 109.21(d)(2)-(5). More recently, the U.S. District Court for the District of Columbia held that the revisions to the content and conduct standards of the coordination regulations at 11 C.F.R. §§ 109.21(e) and (d) violated the Administrative Procedure Act (APA) and that the firewall safe harbor provision violated the APA and failed Chevron step 2 analysis; however the court did not enjoin the Commission from enforcing the regulations and the ruling has been appealed by both parties. See *Shryer v. FEC*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007), appeal pending, Nos. 07-5360 and 07-5361 (D.C. Cir.).

Although, the amended coordination regulations were not in effect when the activity occurred in this matter, subsequent amendments to regulations at issue in a particular case often inform the Commission's analysis. In this matter, we note that all of the advertisements at issue were broadcast within 90 days of the primary election, the applicable time frame under the revised coordinated communication regulations. Additionally, this report discusses "firewalls" and the conveyance of public vs. non-public information in the context of an overall analysis of whether impermissible conduct occurred without applying the firewall and publicly available information safe harbors established in the 2006 amended regulations so as not to prejudice Respondents.

³ We reviewed documents submitted by the CPG Respondents in connection with both this matter and in the previous matter, MUR 5365. See fn. 1.

1 Mark Dion, Rep. Toomey's then-Chief of Staff and unpaid campaign advisor who became
2 Committee campaign manager in September 2003 (Attachment 1) and "second supplemental"
3 affidavits from Lerner (Attachment 2) and Keating (Attachment 3).

4 The investigation fleshed out the facts surrounding the interrelationships and interactions
5 between and among Red Sea, the Committee, and the CFG Respondents, including examining
6 communications between Red Sea and CFG/CFG PAC about the Toomey-Specter primary
7 before the December 26, 2003 letter confirming a communications ban about the election.

8 A. There is No Evidence that the CFG Respondents and the Committee
9 Coordinated CFG/CFG PAC Communications Through Red Sea

10
11 Jon Lerner, initially in his individual capacity, and later through his company, Red Sea,
12 has served as a general and media consultant for the CFG Respondents since 2000, shortly after
13 CFG, Inc. was created. In his interview, Lerner indicated that CFG was a significant client of
14 Red Sea's during the 2004 election cycle, although the firm had a total of about 20 clients during
15 that period. At the time, Red Sea consisted solely of Lerner and his associate Jonathan Baron.⁴

16 Lerner was contacted by Rep. Toomey's then-Chief of Staff Mark Dion in January 2003
17 to discuss the possibility of Red Sea working for Toomey in a possible challenge to Senator
18 Arlen Specter. Lerner Aff. at ¶2. Lerner and Baron met with Toomey and Dion that month, and
19 following additional discussions after Toomey decided to run for the Senate on February 28,
20 2003, the Committee hired Red Sea as its general and media consultant on or about April 11,
21 2003. *Id.*; Dion Aff. at ¶4. Red Sea was one of two or three consultants interviewed by the

⁴ In addition to general political consulting and media consulting, Red Sea conducted polling under the trade name Basewood Research. Lerner Aff. at ¶1.

1 Committee, which faced a dearth of experienced consultants willing to work for a challenger to a
2 long-time incumbent. *See* Dion Aff. at ¶3.

3 At the time the Committee hired Red Sea, Red Sea's interactions with the CPG
4 Respondents about the 2004 U.S. Senate primary in Pennsylvania had been limited to general
5 discussions speculating about a possible Toomey challenge to Specter. Lerner Aff. at ¶6. Red
6 Sea had conducted no polling for the CPG Respondents in Pennsylvania, had no discussions with
7 the CPG Respondents concerning possible media or polling plans relating to the primary, and had
8 not been involved in any discussions taking place between CPG and Toomey about the CPG
9 Respondents' possible support of Toomey. *Id.* In fact, although at least one news report
10 indicated that Toomey consulted with CPG as he considered running for Senate,⁵ CPG PAC did
11 not send its first communication to CPG members urging support of Toomey until May 29, 2003,
12 seven weeks after the Committee retained Lerner.⁶

13 In light of Red Sea's role as a general and media consultant to the CPG Respondents and
14 the Committee, Red Sea observed practices that were akin to "firewalls" to avoid impermissibly
15 using or sharing information obtained from one client in service of the other. In so doing, Lerner
16 specifically agreed with the Committee as part of Red Sea's employment negotiations that Red
17 Sea would observe a so-called "firewall" in its work for them. Red Sea also abided by a pre-

⁵ *See* The Hotline, *Campaigns of 2004 Pennsylvania Senate*, January 17, 2003.

⁶ Dion acknowledged in his interview that the Committee was actively seeking CPG's support during the early part of 2003, but had doubts about its ultimate success because certain CPG board members supported Arlen Specter. His statement is generally supported by the May 29, 2003 letter to CPG members, which acknowledges that "some CPG members believe it is mistake to back Toomey" because it could jeopardize Republican control of the Senate. Though the letter ultimately recommends that members support Toomey, it leaves the decision to contribute to each member "given the controversy surrounding [the race]."

1 existing "firewall" arrangement it had with the CFG Respondents that kicked in whenever Red
2 Sea was retained by a candidate.

3 With respect to the Committee, the Committee learned during its employment
4 negotiations with Red Sea that Red Sea was currently working as a consultant with the CFG
5 Respondents. Lerner Aff. at ¶3; Dion Aff. at ¶4. Lerner advised the Committee that if hired, Red
6 Sea would not be involved in any way with any CFG or CFG PAC activities connected to the
7 Toomey-Specter election, including any communications in Pennsylvania that referenced
8 Toomey or Specter. Lerner Aff at ¶3. Red Sea's proposed course of action was in accord with
9 its established "firewall" practice with the CFG Respondents, as specifically described below. In
10 addition to Red Sea's exclusion from any role in CFG/CFG PAC activities related to the
11 Toomey-Specter election, the Committee and Lerner also agreed that Red Sea would observe a
12 "firewall" to prevent it from sharing any internal Committee information with the CFG
13 Respondents and vice-versa. See Dion Aff. at ¶¶4-5; Lerner Aff. at ¶¶ 3 and 5. The Committee's
14 insistence on such an arrangement was driven by its desire to prevent distractions that might arise
15 over the appearance of coordination in light of Red Sea's dual relationship with it and CFG and
16 Toomey's desire that the campaign operate above reproach. Dion Aff. at ¶4. Both Lerner and
17 Dion believe the agreement was observed. Lerner Aff. at ¶5; Dion Aff at ¶5.

18 Red Sea's "firewall" arrangement with the Committee complemented a similar,

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1 established "firewall" practice that has been developed between CPG and its regular vendors.⁷
2 As part of that practice, whenever Red Sea or another CPG/CPG PAC vendor is retained by or
3 associated with a candidate, the vendor so advises CPG/CPG PAC and is then systematically
4 excluded from any CPG/CPG PAC meetings, discussions, and phone calls in which the
5 candidate, the relevant election involving the candidate, CPG PAC activities in connection with
6 the election, or any communications mentioning the candidate and opponent is discussed. See
7 Keating Aff. at ¶3; Lerner Aff. at ¶4. CPG also instructs the excluded vendor not to
8 communicate with CPG/CPG PAC personnel about the candidates, the relevant election and the
9 campaign generally, and similarly instructs its personnel and other vendors not to communicate
10 with the excluded vendor about the affected candidates, the relevant election, communications
11 referencing the candidates, or related topics. See Keating Aff. at ¶3. Finally, the CPG then hires
12 other "Independent" vendors for communications, polling or strategy in any geographic area in
13 which a vendor is "conflicted out" as a result of its affiliation with a candidate. Keating Aff.
14 at ¶4.

15 Lerner and Keating aver that the CPG Respondents' "firewall" practice was followed in
16 the case of Red Sea's affiliation with the Committee. First, Lerner advised the CPG Respondents
17 that Red Sea had been retained, and thereafter, Lerner and his associate Jonathan Baron were

⁷ CPG apparently did not routinely convey its "firewall" practice to its vendors and employees in writing. The December 26, 2009 letter that Lerner drafted at David Keating's request appears to be an effort to document the practice, though. The letter confirmed Keating's and Lerner's understanding that "henceforth" persons employed by or affiliated with Red Sea and its subsidiaries will have no discussions or communications with persons employed by or affiliated with CPG pertaining to the Republican U. S. Senate primary in Pennsylvania. In his interview, Lerner stated that the letter was drafted as a result of Keating's oft-expressed concern about complying with campaign finance laws, and the 120-day pre-election window governing when communications referencing a candidate could be considered coordinated was set to begin the next day. Lerner attributed his use of the word "henceforth" to inertial drafting but confirmed in his prior sworn statement that the practice reflected in the letter began when Red Sea was retained by the Committee. Moreover, despite the broad statement that the parties would have "no discussions" related to the Specter-Toomey primary, Red Sea and CPG staff members did engage in a relatively small number of non-substantive communications about the election as discussed below.

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1 excluded from all substantive CPG/CPG PAC discussions, meetings and phone calls about the
2 Toomey-Specter race, the candidates, the Committee and communications that referenced the
3 candidates, including portions of discussions, meetings and phone calls in which those topics
4 were discussed. See Keating Aff. at ¶5; Lerner Aff. at ¶4. More broadly, the parties ceased all
5 communications involving non-public information related to the 2004 Toomey-Specter primary,
6 the candidates and the Committee. Lerner Aff. at ¶5. Next, since Red Sea was working for a
7 Pennsylvania candidate, the CPG Respondents hired "independent" companies to create, produce
8 and distribute the four CPG/CPG PAC advertisements that were broadcast in Philadelphia media
9 markets in 2004 and featured Arlen Specter. Warfield & Company ("Warfield") created and
10 produced the advertisements and Thompson Communications ("Thompson") handled the ad
11 placement. Keating Aff. at ¶6. In further observance of the "firewall" practice, Red Sea
12 conveyed no information about the Committee, including its finances, ads, media plans, and
13 media budget to Warfield or Thompson. Lerner Aff. at ¶8.

14 Keating's and Lerner's sworn statements about the existence of CPG Respondents'
15 "firewall" practice and its implementation were corroborated by a former CPG employee and
16 Red Sea's observance of the "firewall" arrangements with both of its clients was generally
17 corroborated by the documents produced.

18 In its role as general political and media consultant to the CPG Respondents, Red Sea
19 produced many of their non-Specter/Toomey advertisements, and Lerner and Baron often
20 attended CPG weekly staff meetings. According to former CPG Membership Director Lynn
21 Bradshaw, the few permanent staff members who worked at the CPG offices during the 2004
22 election cycle were aware that Red Sea was working for the Toomey Committee. Bradshaw

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1 confirmed that Lerner was routinely excluded from CPG discussions about Toomey, the
2 Toomey-Specter primary, and CPG/GFC PAC-related activities. For the most part, meetings
3 were structured so that discussions occurred when Red Sea or another "conflicted" vendor had
4 finished discussing races on which they exclusively worked for the CPG Respondents. On
5 occasion, however, Lerner was asked to leave when staffers were about to discuss a candidate for
6 whom Red Sea worked.⁵ Documents obtained appear to reflect an effort to wall off Lerner from
7 information about the Toomey-Specter primary race. Prior to Lerner's retention by the Toomey
8 Committee in April 2003, Lerner was included on three memoranda prepared for CPG by its
9 research consultant that contained assessments and recommendations of certain House races that
10 CPG might become involved in. In four similar memos dated after April 2003 that discuss
11 possible and actual targeted federal races, Lerner is not listed as a recipient. Two of these memos
12 included general information on the Toomey-Specter race.

13 The documents produced also corroborate the Lerner and Keating affidavits in that they
14 reflect no substantive discussions and convey no non-public information concerning the
15 Committee, the Toomey-Specter race, the candidates, or communications that featured the
16 candidates. Lerner acknowledged that he and the CPG Respondents sometimes discussed aspects
17 of the race that were public because he understood FEC coordination regulations to prohibit
18 sharing information pertaining to substantive matters such as advertising, polling, strategy or
19 "future" plans but not matters in the public domain. Although the coordination regulations in
20 effect at the time do not distinguish between "public" or "non-public" information, none of the

⁵ To further illustrate the extent to which the practice was followed, Bradshaw stated that CPG/GFC PAC kept track on a chalkboard of money raised for targeted races that excluded all those on which Red Sea or other vendors were independently working for one of the candidates. CPG's Operations Director kept those figures on a piece of paper and staff discussed them only in the absence of Red Sea or other "conflicted" vendors.

1 information exchanged appears to convey information about the Committee's plans, projects,
2 needs or activities that was material to the creation, production or distribution of the CFG
3 Respondents advertisements.

4 Most of the documents produced that reflected communications between the Committee
5 and Red Sea on the one hand and the CFG Respondents on the other hand consisted largely of
6 email exchanges containing or linking to newspaper or other written articles about the Toomey-
7 Specter race. The articles ranged from accounts about each candidate's fundraising based on
8 FEC disclosure reports to endorsements to analyses of the race by conservative commentators.
9 Most such emails were sent in 2003, months before CFG began airing its advertisements in
10 February 2004. In two instances in August and September 2003, Lerner emailed Keating and
11 Moore links to websites discussing a Toomey advertisement and an MP3 file of a second
12 Toomey advertisement. These two emails are dated the day of, or days after, the advertisements
13 were aired. Copies of Committee press releases about the ads on the days they began airing were
14 also posted on the Committee's website.⁹

15 The documents obtained show only about five email exchanges between the Committee
16 and the CFG Respondents in 2004, after the start of 120-day coordinated communications
17 window. One exchange between Lerner and the CFG Respondents suggests there had been little

⁹ Only one series of email exchanges on December 2, 2003 conceivably could be construed as the Committee requesting or suggesting a CFG communication (per 11 C.F.R. §§ 109.21(d)(1)). In separate emails to CFG from Lerner and Mark Dion, they advised CFG of advertisements by a group called GOP Mainstreet that criticized Toomey for his vote against the Medicare drug prescription program. Dion's email simply forwarded without comment a news account about the ads. Lerner first sent an email telling the CFG Respondents about the ads and later sent a second email with a copy of the same news account Dion had sent. Lerner's email states, "Our foes seem to have developed deeper pockets or a more aggressive posture. Perhaps it can be used to motivate Club donors." Moore responded by stating, "We should do some radio ads praising him for standing up against big government." However, there is no evidence that the CFG Respondents paid for any communication in response to these emails, within, or even outside of, the 120-coordinated communication pre-election window.

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1 communication between them about the campaign for some time. In an email written the night
2 before the primary election, Lerner reflected on the up-hill battle that Toomey fought, thanked
3 CFG for its involvement in the face of Specter's financial advantage, and offered to share
4 "interesting angles" with the CFG "in the days ahead." In responding to Lerner's email the next
5 day, CFG President Stephen Moore thanked Lerner for the note and asked his opinion of the four
6 CFG/CFG PAC Specter advertisements aired in 2004.¹⁰ Lerner's offer to speak with CFG after
7 the election and Moore's question seeking Lerner's opinions on the ads, suggest they had not
8 previously discussed the ads or the campaign in-depth.¹¹ In short, the investigation did not reveal
9 evidence that the Respondents coordinated communications through Red Sea.

10 **B. There is No Evidence that the CFG Respondents and the Committee**
11 **Coordinated Communications Through Other Vendors**
12

13 In addition to examining whether Red Sea directly coordinated with the CFG
14 Respondents with respect to the Specter advertisements, based on documents produced, the
15 investigation also examined whether a subcontractor used by Red Sea and two other vendors who
16 worked for the Respondents served as possible conduits, either directly or through Red Sea, of
17 Committee information that may have been material to the CFG Respondents' ads.

¹⁰ The other 2004 email exchanges consisted of an emailed invitation to, and reminder of a Toomey fundraiser from Dion to Stephen Moore; a Lerner email forwarding a photo of Specter falling with little comment; and an email exchange between Lerner and Bradshaw in which Lerner declined to attend a CFG staff meeting that week because a filmmaker from the Discovery Channel was going to be present.

¹¹ Another type of exchange between the Committee and CFG, one not reflected in the documents, are contacts between CFG's operations director and the Committee concerning the forwarding of earmarked contributions, questions about them and FEC-required disclosure information. See Keating Aff. at ¶8 and CFG's Interrogatory Response at 8. Both Keating and Dion stated in their affidavits that the staff members involved in these limited discussions were instructed to have no substantive communications and that the Committee staff was repeatedly warned not to share internal Committee information. Keating Aff. at ¶8; Dion Aff. at ¶8. In addition, Dion stated that internal Committee information, including its budgets and overall finances was closely held to key personnel. *Id.* Lyn Bradshaw, who answered CFG's phones, said in her interview that these types of communications occurred by phone between Rozensky and the Committee's Finance Director, Erika Sather. Dion stated in his interview that Sather was not privy to the Committee's various budgets, including its media budget or its media strategy.

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1 Red Sea subcontracted with another vendor, Jamestown Associates, to place the
2 Committee's media buys. Lerner Aff. at ¶7. In accordance with Red Sea's practice in choosing
3 media placement firms, Lerner asked and was assured by a Jamestown principal that the firm was
4 doing no other work in Pennsylvania. *Id.* Jamestown's role was to gather cost information about
5 media markets that Lerner used in recommending where and when the Committee should air its
6 ads and to execute the decisions ultimately made by Toomey and Dion. Although CFG's IRS
7 reports indicate it had used Jamestown Associates in prior years, as noted earlier, Thompson
8 Communications handled media placement for the CFG/CFG PAC ads at issue. Keating Aff. at
9 ¶6. Red Sea had no information about CFG's advertisements, or its media placement, strategy or
10 budgets in making recommendations about the Committee's advertising and conveyed no
11 information about the Committee's ads, its media placement, strategy or budget, its opposition
12 research or its overall finances to the CFG Respondents or its vendors, including Thompson
13 Communications. Lerner Aff. at ¶8.

14 Finally, documents produced also indicated that two other vendors worked for both the
15 CFG Respondents and the Committee during the 2004 election cycle: Rainmakers, a fundraising
16 firm and Shirley and Banister, a public affairs firm. No evidence was obtained indicating that
17 either of these firms, directly or indirectly, conveyed material information about the Toomey
18 Committee to the CFG Respondents.

19 With respect to Rainmakers, the investigation focused on whether the firm conveyed
20 information about the Committee's specific financial needs that may have been material to the
21 timing or placement of the CFG Respondents' advertisements. However, Rainmakers worked
22 for the Committee for only a short period in 2003 to organize fundraising events outside

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1 Pennsylvania, and it was not privy to information about the Committee's overall finances or its
2 budgets.¹² Dion Aff. at ¶8. For his part, Lerner occasionally saw Rainmakers' principal, Steve
3 Goodrick, at CFG's weekly staff meetings but had little interaction with him since Red Sea's
4 consulting work was unrelated to work performed by Rainmakers.¹³ Lerner averred that Red Sea
5 had no communication with Rainmakers or Goodrick about the Committee or the Toomey-
6 Specter primary election. Lerner Aff. at ¶9.

7 Shirley & Banister ("S & B"), a public relations firm, also worked for both the CFG
8 Respondents and the Committee during the 2004 election cycle, and one of its representatives
9 occasionally attended CFG staff meetings. Again however, the Committee hired the firm on a
10 one-month trial basis in 2003 to book earned media appearances for Toomey after which it
11 declined to continue using the firm. See Dion Aff. at ¶7. During the short time that S & B
12 worked for the Committee, Dion averred that the firm was not privy to internal information about
13 the Committee's media strategy or media budget, essentially ruling it out as a conduit of
14 Committee information material to the CFG Respondents' advertisements. *Id.* Similarly, Lerner
15 was unaware of any work S & B did for the Committee. He specifically averred that Red Sea
16 had no communication with anyone associated with S & B about the Committee or the Toomey-
17 Specter primary election. Lerner Aff. at ¶10.

¹² The Committee's reports reflect two payments to Rainmakers in 2004. Dion told us in his interview that Rainmakers worked for the Committee for only about six weeks in 2003 and that he had been unhappy with their services. A dispute with the firm over its billings resulted in payments being spread out over several months.

¹³ A limited number of email exchanges between Rainmakers and the CFG Respondents between July and September 2003 concern fundraising events for Toomey held outside Pennsylvania to which CFG members were to be invited. Although these emails evidence the CFG's awareness of a handful of 2003 fundraising events for Toomey, none are relevant to the coordination of the CFG Respondents' advertisements.

C. Conclusion

In summary, despite Red Sea's significant role as a general and media consultant to both the CFG Respondents and the Toomey Committee during the 2004 election cycle, the investigation uncovered no evidence that the CFG Respondents and the Committee coordinated CFG/CFG PAC's advertisements, through Red Sea, directly or through other vendors. See 11 C.F.R. §§ 109.21(d)(2) and 109.21(d)(4) (2004). Accordingly, we recommend that the Commission take no further action with respect to Citizens Club for Growth, Inc. f/k/a Club for Growth, Inc., Citizens Club for Growth, Inc. PAC f/k/a Club for Growth Inc. PAC and Pat Toomey, in his official capacity as treasurer ("CFG PAC"), and Pat Toomey for Senate Committee and Jeffrey M. Zimaskind, in his official capacity as treasurer, in connection with the allegations that they coordinated advertisements aired in 2004. We also recommend that the Commission find no reason to believe that Pat Toomey violated the Act. Mr. Toomey was designated as a respondent in his personal capacity at the commencement of this MUR because he was named in the complaint. The Commission has never made any findings as to him and the investigation uncovered no evidence that he coordinated the advertisements at issue. Finally, we recommend that the Commission close the file in this matter.

V. RECOMMENDATIONS

1. Take no further action as to Citizens Club for Growth, Inc. f/k/a Club for Growth, Inc.; Citizens Club for Growth, Inc. PAC f/k/a Club for Growth Inc. PAC and Pat Toomey, in his official capacity as treasurer; and Pat Toomey for Senate Committee and Jeffrey M. Zimaskind in his official capacity as treasurer.
2. Find no reason to believe that Pat Toomey violated the Act based on the complaint filed in this matter.
3. Close the file.
4. Approve the appropriate letters.

3. Close the file.

4. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

3-28-08
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